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# NAVAL POSTGRADUATE SCHOOL

## Monterey, California



## THESIS

### EUROPE, THE UNITED STATES, AND THE INTERNATIONAL CRIMINAL COURT

by

Jacob Candelaria

June 2003

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**EUROPE, THE UNITED STATES, AND THE INTERNATIONAL CRIMINAL  
COURT**

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Lieutenant, United States Navy  
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Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF ARTS IN NATIONAL SECURITY AFFAIRS**

from the

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## **ABSTRACT**

In 1998, 120 members of the United Nations adopted a treaty establishing the International Criminal Court, designed to address issues such as war crimes, genocide and crimes against humanity. The United States, in cooperation with its European allies, was instrumental in bringing this treaty about. In the end, however, it felt compelled to withdraw its signature, an unusual step signifying a high level of dissatisfaction with the structure and competency of the Court. This thesis argues that, while the United States maintains good relations with Europe, its abandonment of the ICC has constituted a major setback to Euro-American relations, and entailed a loss of face among the international community as a whole. Even as the United States has stood aloof from the Court, fearing that its soldiers and officials could face politically motivated trials, Europeans have continued their vigorous efforts to make the ICC a success. The United States and Europe are now on opposing sides on a major issue of international criminal justice. This has already caused tensions over internationally sanctioned peacekeeping troops, and has the potential to further disrupt the Euro-American partnership, above all in the military sphere.



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I love you, always.

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## **I. AN INTRODUCTION TO THE ICC AND EURO-AMERICAN RELATIONS**

Nor, again, is it at all strange that one who comes from contemplation of divine things to the miseries of human life should appear awkward and ridiculous when, with eyes still dazed and not yet accustomed to the darkness, he is compelled, in a law-court or elsewhere, to dispute about the shadows of justice or the images that cast those shadows, and to wrangle over the notions of what is right in the minds of men who have never beheld Justice itself.

- Plato, *The Republic* (ca. 427-347 B.C.)  
(The Allegory of the Cave)

Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.... Hence it is evident that in seeking for justice men seek for the mean or neutral, for the law is the mean.

- Aristotle, *Politics* (384-322 B.C.)  
(The Rule of Law)

On July 17, 1998 in Rome, 120 Member States of the United Nations (UN) adopted a treaty that established for the first time in history a permanent and independent international criminal court.<sup>1</sup> The International Criminal Court (ICC) came into force on July 1, 2002 with the ability to investigate and prosecute those individuals committing crimes considered to be of sufficiently high magnitude as to concern the international community. This treaty was the result of the international community having failed to prevent multiple episodes of gross atrocities in the twentieth century. The most influential instances of these gross acts happened on European soil, above all the Holocaust of European Jews during World War II, but also the mass genocide that occurred in the former Yugoslavia in the 1990's. It does not belittle other episodes - such

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<sup>1</sup> Derived from the Rome Statute of the International Criminal Court, located at: <http://www.un.org/law/icc/>, [accessed 6 December 2002].

as the killing fields in Cambodia, genocide in Rwanda and other instances in Asia, Africa, and Latin America - to note that it was two separate counts of genocide in Europe, for good or ill, that had the most significant political impact. These events led the involved nations to produce wartime tribunals to prosecute those responsible for the heinous acts; the International Military Tribunal (IMT), better known as the Nuremberg War Crimes Trials, and the International Criminal Tribunal for the former Yugoslavia (ICTY), also known as the Hague Tribunal, respectively. Much of the effort to create such institutions was done through European and American cooperation. The Treaty of Rome, establishing the International Criminal Court was no different. Euro-American efforts formed the necessary basis for the treaty. Yet when it came time to sign and ratify the treaty, something went terribly wrong. During the approval process that occurred in Rome in July of 1998, "the United States found itself in a nasty minority, siding with Libya, Iraq, Yemen, and Qatar, China, Sudan against the Court."<sup>2</sup>

The United States maintains itself as a moral, ethical, and just leader in the international community. By backing out of the Treaty of Rome, American diplomats have aroused significant concern from European allies and the world community at large. It is feared that the United States is intent on slowing down the process of bringing international criminals to justice and securing a more stable future for the world. Has the United States strained relations with its European allies by not ratifying the Rome Statute and deciding to withdraw its signature from the Treaty? The major argument posed by this thesis is that, although the United States maintains good relations with Europe, its non-ratification and decision to withdraw its signature<sup>3</sup> from the Treaty of Rome have caused a political setback vis-à-vis its European allies, and loss of face among the greater international community. The goal is not necessarily to provide an answer to whether the ICC is good or bad or whether the U.S. and European stances on the ICC are good or bad.

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<sup>2</sup> Ruth Wedgwood, "Fiddling in Rome," *Foreign Affairs* (November/December 1998): 20.

<sup>3</sup> In a communication received on 6 May 2002, the Government of the United States of America under the administration of George W. Bush informed the Secretary-General of the following: *"This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."*

Rather the ICC will be examined as an episode that has put a dent into trans-Atlantic relations, which may lead to further degradation of the historical friendship between America and Europe and damage international progress if events continue along the present course. This may not have a great impact on economic ties or immediately affect military cooperation but there will be some serious consequences for items such as post-war proceedings – for example, post-war Iraq. Equally important are the legal proceedings that will arise as the United States continues to pursue the war on terrorism, which will require international backing and support. And it has already been seen in instances, such as the continuing UN peacekeeping efforts in Bosnia, that the long term American stance on the issue has the potential to disrupt operations and degrade mission readiness of internationally sanctioned forces.<sup>4</sup>

This chapter will provide an introductory overview of the ICC and an initial look into the Euro-American political setting in which the Court resides. Chapter II will consider past attempts of international criminal justice posed by cooperation between Europe and the United States starting with the International Military Tribunal (IMT) at Nuremberg. The precedents established at Nuremberg will be reviewed and some opinions about the shortcomings of the IMT will be explored. American and European points of view on the overall significance of Nuremberg will be compared. The second half of the chapter will move to the next major attempt of international criminal justice implemented through Euro-American cooperation at the International Criminal Tribunal for the former Yugoslavia (ICTY), otherwise known as the Hague Tribunal. Here, the chapter will also consider whether the Hague Tribunal is an improvement upon the Nuremberg experience. Again, the goal is to keep perspectives of both the United States and Europe in mind. Other historical and perhaps equally important international tribunals, such as the “Tokyo half” of the IMT and the International Tribunal for Rwanda (ICTR) will not be examined, as the focus will be on the two major precedents on European soil. Chapter III will use the history established in Chapter II to introduce the arguments for and against the ICC from both American and European points of view. It

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<sup>4</sup> In July 2002, the United States threatened to withdraw troops from Bosnia (UNMIBH – United Nations Mission in Bosnia-Herzegovina) unless immunity for American soldiers from the ICC was granted. The UN Security Council granted the United States a one-year stay of immunity for its soldiers in Bosnia and all non-signatories of the ICC treaty. Once the year is up, the Security Council will re-evaluate the issue.



will also examine the details of why the United States supported the creation of the ICC but then failed to join the treaty by ratification and in fact withdrew its initial signature<sup>5</sup> from the treaty. European reaction to American actions and the effects on Euro-American relations will be the focus of the remainder of the chapter. Chapter IV will look at what lies ahead for the ICC and explore ways the United States and Europe can amend or reconcile their cooperative effort to improve upon international criminal justice. Some implications and predictions for future progress of international criminal justice will be made.

As a consequence of the U.S. rejection of the Rome Statute, Americans and Europeans are now placed on differing sides on the issue of international crimes. This is important because future prosecution of these crimes may be obstructed or hindered due to this opposition that now exists between the trans-Atlantic powers. This study intends to examine past attempts of prosecuting international war crimes, review the creation and status of the ICC while focusing on Euro-American relations throughout this process.

#### **A. DEFINING EUROPE**

It is intended that this thesis examine the relations of the United States and Europe in regard to the ICC but it is evident that asked to list the countries that comprise Europe, different people would provide very different lists. Some may wish to narrowly include only those member-countries, fifteen in total to date (although there are some thirteen candidate-states), of the European Union (EU) but this would exclude many countries that must not be excluded from the overarching definition of Europe such as Norway, Switzerland, and Poland; Norway and Switzerland have no intention of joining the EU. Many of the recognized eastern European countries that are members of the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) would be also be excluded along with the smaller powers of “old Europe” such as Liechtenstein, Malta, Andorra, San Marino, Monaco and the Holy See. Those concerned with Western security and defense issues would definitely consider the Czech Republic, Hungary,

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<sup>5</sup> In final day of his presidency in December 2000, President Clinton signed the Rome Statute to show his administration's support for the Treaty.

Poland and Turkey part of Europe, especially considering their membership in NATO (North Atlantic Treaty Organization).<sup>6</sup>

Despite this challenge, it is common for diplomats, scholars, pundits, media and others to refer to Europe both as a collective geographic area and as a conglomeration of policies and political attitudes. It is true that it would be a mistake to consider the politics of France and Great Britain as indistinguishable. However, it is widely recognized that Europe holds a special commonality in the realm of international relations that far exceeds its continental meaning, that is, Europe is much more politically bound together than, say, Asia or Africa. There is obviously little point in comparing Europe to Antarctica. Thus it is with these thoughts in mind that this study will examine Europe, the United States and the ICC.

## **B. ESTABLISHING THE ICC**

On December 9, 1948, the UN General Assembly recognized the need for “an international judicial organ.”<sup>7</sup> This was the day that Resolution 260 was issued which invited the International Law Commission to study the creation of an institution that could try persons for international crimes, specifically genocide. The lesson from World War II and the Nuremberg Trials was that it is absolutely necessary to prevent mankind from repeating the horrible atrocities experienced in the Holocaust. The sentiment “Never Again” was a creation of the times. The International Law Commission concluded that it was both desirable and possible to establish an international court to try persons charged with genocide and other crimes of similar weight. By 1953 a draft statute was finalized.

With the onset of the Cold War, further progression on the court ceased and it was not until December of 1989 that the UN considered resuming work on establishing an international criminal court. In 1993, the conflict in the former Yugoslavia erupted and

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6 For an excellent and brief layout of Europe with respect to some major international organizations, refer to figures such as The European Security Architecture, found in: David S. Yost, *NATO Transformed, the Alliance's New Roles in International Security* (Washington D.C.: United States Institute of Peace Press, 1998): xxi.

7 United Nations Convention on the Prevention and Punishment of the Crime of Genocide – taken from Rome Statute of the International Criminal Court ‘Overview’ webpage, located at: <http://www.un.org/law/icc/>, [accessed 6 December 2002].

what was once thought to be an impossible reliving of the past happened again. Genocide, war crimes, and crimes against humanity became, once more, the highest of international concerns. There was no time, however, to develop a robust and all-inclusive court because judicial service was quickly needed to help bring an end to the existing crisis. The UN decided to create an ad hoc tribunal as had previously been done at Nuremberg.

The International Law Commission continued its work, however, and by 1994 it submitted the final draft of a statute to the General Assembly. A Preparatory Committee was then tasked to write the convention establishing the International Criminal Court (ICC). The resulting statute was finally adopted on July 17, 1998 and opened for signature. Sixty ratifications were necessary to make the treaty effective and this was achieved on April 11, 2002. This meant that as of July 1, 2000, genocide, war crimes, and crimes against humanity committed after this date are eligible for trial by the ICC.

### **C. OVERVIEW OF THE COURT**

The long-held dream of a permanent International Criminal Court is nearing reality. Our hope is that by punishing the guilty, the ICC will bring some comfort to the surviving victims and to the communities that have been targeted. More important, we hope it will deter future war criminals, and bring nearer the day when no ruler, no State, no junta and no army anywhere will be able to abuse human rights with impunity.

- Kofi Annan, United Nations Secretary General

It is common for some to confuse or to identify the ICC with the ICJ – the International Court of Justice. The ICJ is the judicial body of the UN having the jurisdiction to hear cases concerning one country (or state) against another. The ICC, on the other hand, has a mandate to try individuals rather than states and does not fall under the purview of the UN, even though the establishment and maintenance of the ICC has depended on the direct effort the UN. Although it is independent, the ICC does maintain an open line of communication with the UN. The ICC is supposed to complement existing national judicial systems and is designed to act only if national courts are unwilling or unable to investigate and prosecute such crimes.

The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. Although this expression is vague, the Court has jurisdiction in accordance with the statute with respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Jurisdiction over the crime of aggression will not go into effect until an agreed upon definition of the crime is arrived at and the conditions concerning this crime are established.<sup>8</sup> Other matters of dissatisfaction and contention are also present, such as many countries have raised the fact that the ICC does not cover terrorism or drug trafficking. However, the crime of terrorism and drug trafficking could be potential additions pending the approval of the State Parties.

The following is a summary of how the ICC interprets the three broad categories of crime under its present jurisdiction:

\*

#### Article 6: Genocide

Genocide are any acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

#### Article 7: Crimes against humanity

Crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this definition or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of

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<sup>8</sup> Aggressive crimes will be formulated in the spirit of the Charter of the United Nations outlawing aggressive war unless acting in self-defense or with the permission of the UN.

apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

#### Article 8: War crimes

War crimes are prosecuted particularly when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Examples: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention; (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; (c) In the case of an armed conflict not of an international character, serious violations of the Geneva Conventions committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention; (d) Examples of armed conflicts not of an international character are situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature; (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law; (f) Other serious violations are defined as armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. Nothing in contained in the definition of war crimes shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.<sup>9</sup>

\*

There are only certain conditions in which the ICC can exercise its jurisdiction and only as long as it meets one of four conditions: 1) one or more of the parties involved is a State Party; 2) the accused is a national of a State Party; 3) the crime is committed on the territory of a State Party; 4) a State not party to the Statute decides to accept the court's jurisdiction for a specified crime over one of its citizens.<sup>10</sup> All these conditions, however, coexist with the fact that an ICC prosecutor who is an independent attorney will be assigned to each case. Thus, either the prosecutor must initiate an

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<sup>9</sup> The section marked with asterisks (\*) is taken directly or paraphrased from the Rome Statute of the International Criminal Court located at: <http://www.un.org/law/icc/>, [accessed 6 December 2002].

<sup>10</sup> Kenneth Roth, "The Court the U.S. Doesn't Want," *The New York Review of Books* (19 November 1998): 45.

investigation or a state party to the treaty (or the UN itself) can refer cases for trial before the ICC.

The ICC will physically be located in the Hague, Netherlands, where construction is underway to give the Court a home by 2007. Until then, the Court resides in facilities adjacent to the International Criminal Tribunal for the Former Yugoslavia (ICTY). Since the ICC is a separate entity from the UN, the statute mandates that the Court will be funded by States Parties and by voluntary contributions from governments, international organizations, individuals, corporations and other entities. The UN could, in special circumstances, provide funds with approval of the General Assembly. Funding will be a critical issue in the absence of U.S. support. Other organizations receiving funding from the UN will likely be unwilling to surrender funds from their causes in order to promote the ICC. Those who believe that “the love of money is the root of all evil” may assume that the main problem Europe has with the United States not joining the Court is funding. Europe wants to have an effective ICC but may not be willing to pay for it alone. As it will be shown, this issue is not that simple. Money is but one of several burdens that the Court faces.

#### **D. THE TRANS-ATLANTIC LINK: DRIFTING APART?**

Before getting too deep into the views of Europe and the United States on the ICC, it is important to have a fair understanding of the overall Euro-American political setting. The origins of the modern trans-Atlantic relationship between Europe and the United States has deep roots into the past, but most of the vital characteristics of today can be traced from the conclusion of the Second World War and the onset of the Cold War. Throughout the Cold War and up until modern times the trans-Atlantic link has constituted a crucial factor in maintaining peace and stability in Europe, and indirectly throughout the whole world. Why then, does there appear to be a sharp division between the allies on matters such as the ICC and other contemporary issues such as the necessity of war in Iraq?

Many Europeans regard the United States as an aggressive power, whose objective is to remain the only super-power in the world, and to export its “utilitarian” way of life. Europeans believe that they should provide an alternative option for globalization, otherwise known as “Americanization,” for the rest of the world to prevent

it from becoming a homogenized “cultureless” consumer society. The Americans usually accuse the Europeans of hypocrisy and ingratitude. For example, they consider the EU politically inefficient and sarcastically recall former Secretary of State Henry Kissinger’s request for one telephone number.<sup>11</sup> The current clash of views among the allies on the necessity of a war with Iraq seems to support the view that a significant gap has been formed between the United States and the core of the European states. It not only shows differences in the fields of culture, economics, security and defense but also implies an overall trend suggesting that Europe and the United States are drifting apart. With the end of the Cold War and the disappearance of the Soviet threat, it may seem that the goals of Europe and the United States have begun to diverge especially when looking at issues such as the ICC. The fact is, however, that many of those goals never were perfectly parallel or converging. In some respects, the Cold War itself can be seen as a major cause for Europe and the United States having some trouble with their relationship today.

Due to their different Cold War experience and heritage, Americans strongly believe in military might while the Europeans are committed to more peaceful and diplomatic solutions to international problems. This arrangement was caused by a historical pattern that was initiated by a dilemma that Europe faced with the escalation of the Cold War and with the realization that the Soviets posed a threat on the eastern European border. On one hand they needed the American financial and military aid against Soviet expansion, on the other hand they did not want to be dependent on a power far away from Europe. Close political, economic and military cooperation between the Western European states could be the only way out of this dilemma, but the imminent Soviet threat, the fear of a German revival, and severe economic problems prevented them from considering this option seriously. Both Europe and the United States realized that without massive American involvement the freedom of Europe was in danger. A cliché of the times was, “Keep the Russians out, the Americans in, and the Germans

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<sup>11</sup> It refers to Kissinger’s frustration with the lack of unified European position on foreign policy issues.

down.” With the announcement of the Truman Doctrine<sup>12</sup> in March 1947, the United States assumed this task and committed itself to help free peoples in their fight against Communism. The Truman Doctrine meant a turning point in the relationship of the United States and Europe. It made the United States the leading power of the trans-Atlantic alliance and meant that Europe would become dependent on American protection.

The result of this new situation was a burden-sharing misperception by both sides in that Americans now viewed Europeans as “free-riders” under the U.S. security umbrella, while Europeans viewed Americans as using Europe as a means of defending itself against Communism by forward deploying forces in Europe and of promoting American interests over European ones. European concerns were further increased, when the Soviets launched Sputnik in 1957. This event signified that the Soviet Union had become capable of launching a massive nuclear attack on U.S. territories by its inter-continental missiles. It became a source of “hysteria” in the United States, and eventually led to the rejection of the strategy of massive retaliation. Perhaps this can be considered another negative turning point in Euro-American relations. Europe began to question the reliability of American commitment to defend Europe in the new security environment. Their logic was simple. The United States would not risk the lives of millions of American citizens for the sake of Western Europe.<sup>13</sup> And thus a cycle of mutual suspicion and even animosity began within the context of the Cold War.

On top of the historical impact of post-World War and Cold War eras, there have also been recent policy disputes reflecting growing differences in how the United States and Europe view the emerging international order and resulting security environment. The crises in Bosnia and Kosovo rekindled the tensions between the United States and

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<sup>12</sup> In the background of the decision was a Soviet demand for joint control with Turkey of the Black Sea Straits and a British decision to withdraw financial support for the anti-Communist regime in Greece. Communist success in either case would give the Soviets an opening to the eastern Mediterranean and from there to Western Europe and the Middle East. To contain this danger, Truman asked Congress to fund a massive American program of aid to Greece and Turkey which outlined the basis of the Truman Doctrine. Taken from: Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954* (New York: Cambridge University Press, 1998): 11-12.

<sup>13</sup> Argyris G. Andrianopoulos, *Western Europe in Kissinger's Global Strategy* (New York: St. Martin's Press, 1988): 74-75.



Europe on the issue of burden-sharing for security and defense.<sup>14</sup> A reevaluation of American forces versus European forces revealed a sharp capabilities-gap in which the United States by far outweighed Europe. As Europe strives to consolidate and expand through institutions such as the EU and seeks some degree of autonomy (and also a common European market showing great potential), the United States worries that European initiatives could harm existing security structures and on the whole weaken Euro-American relations. While defense and security issues (Kosovo, war on terrorism, and potential war with Iraq) are definitely at the top of the current state of Euro-American affairs, there still remains other outstanding issues, disputes and irritants that have also significantly contributed to the noted deterioration of the trans-Atlantic relationship. One example, obviously, is the ICC. Another is the Kyoto Protocol.

In late March 2001, President Bush announced that the United States would withdraw from the Kyoto Protocol. In the absence of ratification, the treaty is not legally binding. Bush suggested in his June 11, 2001 remarks that instead of committing to the Kyoto Protocol standards, the United States would combat global warming in other ways. In a Climate Change Review issued the same day, he listed development of energy-efficient technology, market-based incentives to encourage industries to reduce greenhouse gas emissions on their own, and conservation programs that help sequester carbon in the soil, as actions the United States would take.

Initially, the American withdrawal from the Kyoto Protocol was considered its death knell. The agreement can only enter into force internationally if it is ratified by at least 55 nations that, together, accounted for at least 55% of the total carbon dioxide emissions in 1990. Given that the United States alone was responsible for about 25% of the 1990 carbon dioxide emissions, experts predicted that without the participation of the United States, the Kyoto Protocol would never be implemented.<sup>15</sup> However, in July 2001, the EU, Japan, Canada, Russia, Australia, and 170 other nations reached an agreement to proceed with the treaty. In order to secure the support of highly

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<sup>14</sup> See Peter W. Rodman, "Drifting Apart? Trends in US-European Relations," The Nixon Center: (Washington D.C. 1999): v, 1, 37-46, 56-57, 64-67, 71-72.

<sup>15</sup> "Abandoned by U.S., Kyoto Protocol an Ailing Patient," U.S. Department of State (5 April 2001), located at: <http://usinfo.state.gov/admin/005/www/1a05.html>, [accessed 21 February 2003].

industrialized nations, the EU was forced to make substantial concessions. The targets for emissions reduction were reduced by two-thirds from the original goals, and countries were given the option of planting carbon-absorbing forests to earn pollution credits, in lieu of reducing emissions.<sup>16</sup> The EU and other nations continue to pressure Bush to adopt the Kyoto Protocol. The Senate Foreign Relations Committee has passed a unanimous resolution calling for him either to sign on to a revised version of the Kyoto Protocol, or to develop a new international agreement for reducing greenhouse gases.<sup>17</sup> In March 2001, a high-level delegation from the EU stated that its members intend to ratify the Kyoto Protocol regardless of what the United States may do. “We are very much prepared to go [ahead] without the U.S.... We can’t allow one country to kill a process to confront a major global problem like this.”<sup>18</sup>

There have also been other cases similar to Kyoto in the post-Cold War that have served as irritants to Euro-American relations such as the so called “banana wars”, the debate over hormone-treated beef, the debate with Germany over the “Stasi” files, Arizona’s execution of Karl and Walter LaGrand, the acquittal of an American EA-6B jet pilot that cut a ski-lift cable in Italy that killed twenty people, U.S. economic sanctions against European companies along with the steel tariffs incident, and the general difference between the United States and Europe on Middle East policy.<sup>19</sup> Perhaps these

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16 Eric Pianin, “Emissions Treaty Softens Kyoto Targets,” *Washington Post* (29 July 2001).

17 Dana Milbank, “Bush Urged to Negotiate Global Warming Treaty,” *Washington Post* (1 August 2001).

18 Ibid.

19 **Banana Wars** – This was one of the more irritating of long-running trade conflicts between the United States and what is now the EU. In the early 1990’s the EU set up a system for banana imports that would favor European colonies in Africa, the Caribbean, and the Pacific, whose bananas happened to be distributed by European firms and discriminated against Latin American bananas, which happened to be distributed mainly by U.S. firms. GATT and the WTO declared the EU’s rules as a violation of standard international trading norms. Each time it was rapped on the knuckles, the EU made a few cosmetic changes in its regulations and content to drag out if not defy the process. The U.S. in return threatened tariffs on European goods such as Scottish cashmere sweaters, French handbags, English greeting cards and Italian cheese. It seems that this episode became almost a sort of comical skirmish somewhat of a fun food-fight (no pun intended) but with serious consequences. Journals such as *The Economist* warned that the situation could “easily get out of hand.”

**Hormone-treated beef** – this is another trade dispute that also includes other genetically modified foods, which the EU has banned. The WTO has ruled against the EU twice, and the U.S. is planning similar retaliation as in the Banana War case.

**Stasi files** – this dispute was over the CIA’s stealthy abduction in 1990 of the files of the East German foreign espionage agency and the American’s refusal to share the treasure trove with the German ally. The CIA felt the information was too sensitive and that the Germans were not trustworthy. Germans took this as the highest form of insult.

incidents cannot be directly linked as causes for major changes in Euro-American relations but definitely they capture the emotions and sentiment. Among this long list of divisive issues, the ICC stands out for its potential to have a major impact on international security, and can definitely be marked as a case that has accelerated the “drifting apart” nature of the trans-Atlantic bond. It is important to keep the other cases in mind as a frame of reference for examining the ICC and the political issues surrounding it. It is also important to remember, that although the argument of this thesis is that the issue of the ICC is contributing to the damage of the Euro-American relations, the ICC is also a story of cooperation and success to some extent.

The creation and establishment of the ICC itself shows some of the more positive traits found in the concern for humanity and common values held by both Americans and Europeans. It appears that Europe and United States have the same well-intentioned goals in mind, but cannot seem to agree on how to implement and execute these goals. Disputes over the ICC may appear to be a gloomy situation for the trans-Atlantic partnership, but the diverging relations of Europe and the United States, caused by issues such as the ICC, may also be a good sign: “Europe today is more peaceful, undivided and democratic as a result of half of century of common effort that the trans-Atlantic partners

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**Execution of Karl and Walter LaGrand** – these were two convicted murderers who claimed dual (U.S. and German) citizenship. Europeans frown upon the death penalty and Arizona did not ensure the observation a German right to consular access for the defendants. Urgent pleas from Bonn and International Court of Justice were issued and the executions were dubbed as “barbarian” by German officials and provoked a storm of denunciations of the United States as a rogue state that violated human rights and showed contempt for international law. One of the defendants chose death by gasing which had a tremendous affect and resonance in Germany. German commentators began to express doubt whether American and Germans shared the same system of values.

**EA-6B/Ski-lift incident** – Italy was deeply shocked by a U.S. Marine court martial’s acquittal of the pilot who cut the ski-lift cable that left twenty dead in Cavalese in 1998. Some Italian officials called for the re-evaluation of military basing rights for the U.S. in Italy. The U.S. eased some of the tension by placing new restrictions on training flights and pursuing the Marine pilots on other grounds.

**Economic sanctions against European companies/Steel** – this was U.S. reaction to many European companies doing business with Iran, Libya and Cuba. Regarding steel, this refers to tariffs that the President Bush placed on European steel in early 2002 and serves as another case whereby the U.S. and EU have both been guilty of preaching free trade where they are most competitive and then closing the markets or introducing other obstructions as soon it is apparent that others can match or outperform the other.

**Middle East policy** - The U.S. considers Europe’s “critical dialogue” with Iran policy as naïve and Europe considered U.S. policy of dual containment for Iran and Iraq as a failure. There is also some noted disagreements between the U.S. and European on Arab-Israeli relations. Europe seem to be pushing too hard for Palestinian statehood for American taste because Israel is claiming that it will need to limit Palestinian statehood on its own terms based on terrorism security issues.

- cases taken and summarized from: Peter W. Rodman, “Drifting Apart?,” 1-4.

can increasingly go their own way. That, by any definition, represents success, not failure.”<sup>20</sup> This assertion may be overly optimistic, especially when coming to the realization that “going their own way” is not helping to ensure the success of the ICC. While cases such as the ICC and Kyoto show some severe differences between Europe and the United States, a trans-Atlantic rivalry is not necessarily in the making but rather that there is a lot of work to be done to overcome inherent cultural and historical differences. As Christopher Patten reminded Americans and Europeans alike, as they have often been reminded, “there is so much more that unites us than divides us.”<sup>21</sup> Thus far, the story of ICC is failure of the trans-Atlantic partners not being able to overcome their divisions and not capitalizing on the strength of their unities. With this narrow but fair understanding of the Euro-American experience, it is possible to better comprehend the two events that would eventually lead to the creation of the ICC; the Nuremberg Trials and the International Criminal Tribunal for the Former Yugoslavia in the Hague, Netherlands.

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<sup>20</sup> Ivo H. Daalder, “Are the United States and Europe Heading for Divorce?,” *International Affairs* (Summer 2001).

<sup>21</sup> Christopher Patten is the EU External Relations Commissioner. The comments were made in his speech, “America and Europe: an Essential Partnership,” at the Chicago Council on Foreign Relations (3 October 2002).

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## II. PAST ATTEMPTS AT INTERNATIONAL CRIMINAL JUSTICE: FROM NUREMBERG TO THE HAGUE

In its general aspect justice is the same for all, for it is a kind of mutual advantage in the dealings of men with one another: but with reference to the individual peculiarities of a country or any other circumstances the same thing does not turn out to be just for all.

- Epicurus, *Letter to Menoece and Principle Doctrines* (341 – 270 B.C.)

And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times...

- Cicero, *The Republican and the Laws* (106 – 43 B.C.)  
(Natural Law and the Unity of Mankind)

For the first time in modern history, criminal justice was formally exercised and enforced on the international plane at the conclusion of the Second World War with the International Military Tribunal (IMT), better known as the Nuremberg Trials and also the International Military Tribunal for the Far East (IMTFE) serving war crimes in the Pacific theatre, known as the Tokyo War Crimes Trials. Sadly, similar criminal tribunals were again needed to settle the atrocities that occurred in Bosnia during the 1990's with the International Criminal Tribunal for the Former Yugoslavia (ICTY), also known as the Hague Tribunal (the Dutch city's name includes "the" in "the Hague" and some also refer to the Hague Tribunal as simply "the Hague"). A similar court was set up in Arusha, Kenya to preside over war crimes committed in Rwanda and has been dubbed the International Criminal Tribunal for Rwanda (ICTR). These four courts are recognized as the predecessors of the ICC and are now being used as examples to both support and critique the new Court.

This chapter will compare and contrast the IMT and ICTY by reflecting on the precedents established at Nuremberg and by examining the progress upon those precedents at the Hague Tribunal while ascertaining both American and European views of these two events. The other historical and perhaps equally important international tribunals – the IMTFE and ICTR – will not be examined as the focus will be on the two

major precedents on European soil. Some conclusions will be drawn, along with a preliminary outlook on how these two historic tribunals have led to the Rome Statute creating the International Criminal Court (ICC) and some of the current issues and problems the Court is now facing.

## A. BACKGROUND

There is a crude assumption that in war, societies act as if all is fair, that all normal moral constraints are suspended, and that they consider themselves entitled to do anything necessary to defeat the enemy.<sup>22</sup> Until recent times, the rights of a sovereign nation to go to war, *jus ad bellum*, were seldom questioned and the constraints on the conduct of war, *jus in bello*, were largely ignored. Furthermore, it was commonly conceived that what happened within a nation's territorial borders was considered a matter of sovereignty; i.e., no one else's business. All these things – going to war, conduct in war, and internal affairs – would rarely have been considered *unlawful*.

However, the “all's fair in love and war” ideology was on some occasions challenged throughout history by philosophers, academics, statesmen, and others and most notably by the Dutch scholar and statesman, Hugo Grotius (1583-1645) who is credited as the founder of international law and whose writings were influenced by his abhorrence of the carnage and unjust suffering experienced through the Thirty Years War.<sup>23</sup> Although some nations and armies had adopted customs and traditions to avoid war and protect the innocent should a war occur, it was not until the Declaration of St. Petersburg (1868) was signed by the major European powers that these concepts were taken a step further than mere customs and traditions.<sup>24</sup> Inspired and influenced by thinkers like Grotius, the first comprehensive codification of international law of war was accomplished by the Hague Conventions of 1899 and 1907 addressing peaceful settlements of international disputes (1899) and the laws and customs of war (1907).<sup>25</sup>

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<sup>22</sup> Howard, Andreopoulos, Shulman, *The Laws of War: Constraints on Warfare in the Western World* (New Haven: Yale University Press, 1994): 1-2.

<sup>23</sup> Norman E. Tutorow, *War Crimes, War Criminals, and War Crimes Trials* (New York: Greenwood Publishing Group, 1986): 3.

<sup>24</sup> This agreement dealt mainly with the regulation of small projectiles.

<sup>25</sup> Tutorow, *War Crimes, War Criminals, and War Crimes Trials*, 3.

At the same time, the Geneva Conventions from 1864 through 1949 brought forth a series of international agreements to regulate and prevent abuses in war and promote the humane treatment of prisoners of war, the sick, the wounded, and non-combatants.

Despite these successes, all these measures were poorly enforced and applied only in a discriminatory and inconsistent manner. It remained customary to extend amnesty to those accused of crimes of war, partly in the interest of post-war reconciliation. As warfare increased in destructiveness through advancements made during industrialization, however, it became clear that it would be necessary to better delineate responsibility for the conduct of war. Unfortunately, two world wars occurred before significant measures were adopted.

## **B. THE IMT: NUREMBERG AND TRIBUNAL ADEQUACY**

The IMT has been widely thought and written about. Most of the observations and arguments are widely known. The creation of the jurisdictions of *crimes against peace*, *war crimes*, and *crimes against humanity* are recognized as the major elements of precedents established at Nuremberg. These jurisdictions were established under the sixth of seven “Nuremberg principles,”<sup>26</sup> as these sets of rules have come to be called, which are primarily concerned with breaches of international law, customs in armed

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### **<sup>26</sup> Nuremberg Principles:**

*Principle 1:* Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefore and liable for punishment.

*Principle 2:* The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law.

*Principle 3:* The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment.

*Principle 4:* The fact that a person acted pursuant to order of his government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.

*Principle 5:* Any person charged with a crime under international law has the right to a fair trial on the facts and law.

*Principle 6:* The crimes hereafter set out are punishable as crimes under international law: Crimes against Peace, War Crimes, and Crimes against Humanity (detailed definitions of each are given in the document).

*Principle 7:* Complicity in the commission of a crime against peace, a war crime or a crime against humanity, as set forth in Principle VI, is a crime under international law.

- Principles taken from: Robert K. Woetzel, *The Nuremberg Trials in International Law* (New York: Frederick A. Praeger, Inc., 1960): 96.



conflict, and individual responsibility under international law.<sup>27</sup> The IMT, however, was designed only to serve one single conflict and left out other criminal actions such as piracy, drug trafficking and slavery.

Even the strongest supporters of the IMT have acknowledged its shaky legal foundation. Some critics have attacked the Nuremberg proceedings as “victor’s justice.” A major flaw that resulted from this weak legal framework was that Nuremberg is “sometimes accused of applying a body of law which had not up to that point been clear or fully applicable to the events under scrutiny; and this is criticized as constituting nothing more than victor’s justice.”<sup>28</sup> The often-used criticism is that the defendants were prosecuted in an *ex post facto* manner on the basis of retrospective legislation. In other words, the Nazis were tried for *war crimes*, *crimes against peace*, and *crimes against humanity* even though there were no formal international prohibitions against any of these crimes committed by *individuals* (on the individual level) during the time of their commission. There were, however, existing international agreements regarding the conduct of *nations* (on the national level) pertaining to war, specifically the Kellogg-Briand Pact of 1928. This treaty renounced war as an instrument of national policy unless in self-defense and it was under this provision that Germany and Japan explained and justified their actions to the IMT.<sup>29</sup> Despite the criticisms of *ex post facto* law and retrospective punishment, Nuremberg was the first attempt to establish an international standard of criminal law where individuals could be held accountable. The IMT for the first time held people responsible for breaches of these standards irrespective of whether governments had signed treaties or agreements regarding these standards.

Nuremberg, again, introduced the world to a shift in international law where not only sovereign governments or nations but also individuals could be charged with war

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<sup>27</sup> J. Holmes Armstead, Jr., “The International Criminal Court: History, Development and Status,” *Santa Clara Law Review* (1998 Vol. 38, No. 3): 748.

<sup>28</sup> Adam Roberts, “Land Warfare: From Hague to Nuremberg” in Howard, Andreopoulos, Shulman., *The Laws of War*, 134.

<sup>29</sup> Martin Wight, *Power Politics*, ed. Hedley Bull and Carsten Holbraad (London: Leicester University Press, Royal Institute of International Affairs, 1978): 110-111.

crimes.<sup>30</sup> Individuals would no longer be allowed to hide behind the sovereign rule of their respective nation. The Nuremberg Charter declared that, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>31</sup> It became evident that the perpetrator was not only the government of Germany, as it had been with the 1919 Treaty of Versailles ending the First World War, but also the Nazi regime and the individual Nazi leaders.

Since it was recognized that international law now not only applied to the state but could also apply to a person or to a group, the IMT decried the use of collective punishments and reiterated that criminal guilt had to be personal. Furthermore, it stated that it should not hesitate to declare an organization to be criminal, if satisfied of its criminal guilt.<sup>32</sup> In this manner, the IMT was able to declare the Nazi Party, in general, a criminal organization and therefore not only the Reich cabinet, military and government officials were tried but also other public and private officials such as bankers, administrators, industrialists, educators and propagandists. The tribunal decided that a criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes.

Even if the Nuremberg Tribunal was questionable in its legitimacy because new laws were applied to past events and because of the “victor’s justice” syndrome, at least future crimes of war, including genocide, would be legitimate areas for prosecution; or so it seemed. The IMT made groundbreaking progress in the realm of international law. It also helped Europe to recover from its dark past and, in this light, the IMT can be looked at as adequately serving the situation of the time. Nuremberg took a huge leap forward in changing international law for the better. “The denunciations that plagued that tribunal – that it was an ex post facto proceeding, that it lacked jurisdiction, that it amounted to

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<sup>30</sup> Geoffrey Best suggests that the War Crimes Tribunals did not have much effect on international law (a view that may be challenged) but rather that the main novelty and innovation of Nuremberg was the concept of personal responsibility even while under superior orders in his book: *War and Law* (London: Oxford University Press, 1997): 205-206.

<sup>31</sup> Robert K. Woetzel, *The Nuremberg Trials*, 96.

<sup>32</sup>Ibid., 191.

victor's vengeance – need not be heard again.”<sup>33</sup> With Nuremberg, the world attained a great legal precedent that created a basis for laws that supersede nations and a basis for a justice system that is capable of new limits.

Although the Nuremberg Trials occurred after the allies claimed victory, it was not always obvious that this was the best course of action for prosecuting the remnants of the accused Nazis. There was some disagreement among the allies<sup>34</sup> as how to best handle punishing the defeated enemy. Churchill first proposed that the “major criminals” should face summary execution but this plan was rejected mainly because Stalin felt all remnants of the Nazi regime should face the same fate, that is either immediate execution or trial, while many American policy-makers and advisors felt that death sentences would be unacceptable without a trial.<sup>35</sup> Roosevelt seemed to have sympathy with the British proposal as he held back in making his position known. “There must be no executions without trial otherwise the world would say we were afraid to try them,” were the words Churchill used to express Stalin's point in a letter that the British Prime Minister delivered to President Roosevelt concerning the issue.<sup>36</sup> And Charles de Gaulle also favored trial rather than summary execution. Initially it seemed that Roosevelt favored the summary executions but later at the famous Yalta conference he indicated that he was not ready to announce his preference or to openly consider the matter. The conference summary simply stated, “the question of major war criminals should be the subject of enquiry by the three Foreign Secretaries for report in due course after the close of the conference.”<sup>37</sup> Roosevelt soon afterward died and never made an official statement on the matter.

After taking office, President Truman made it clear that he opposed summary executions and supported the establishment of a tribunal to try the Nazi leaders. Once

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<sup>33</sup> Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Penguin Books, 1994): 443.

<sup>34</sup> Mainly referring to the “big” three: The United States, represented by President Roosevelt – The United Kingdom, represented by Prime Minister Churchill – The Soviet Union, represented by Secretary-General Stalin. These three were allied against the powers of the Axis three, Germany, Italy, and Japan.

<sup>35</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Little, Brown, and Company, 1992): 31.

<sup>36</sup> *Ibid.*, 31.

<sup>37</sup> *Ibid.*, 32.

London realized that it would be outvoted it gave up its quest for summary executions. In the end, the British realized that this was the better decision because summary executions appeared as a simple solutions to a problem deserving a more complex answer. Perhaps in previous decades a simple execution would have sufficed but not in the 1940's. In addition to the deaths of Hitler, Goebbels and the other top Nazis, the Europeans also wanted the world to make a public judgment stating that the members and supporters of the Third Reich wrongfully hurt innocent people.<sup>38</sup> After all, millions of soldiers and innocent civilians had died – the death of a few Nazis would certainly not have made up for this.

What seemed to be most important was allowing those who suffered under the Nazis to judge and punish. Although the European nations that suffered most were the occupied continental countries, Britain seemed most adamant and vocal in implementing their version of justice upon the Nazis. With Great Britain representing Europe as one of the “big” three allies, most of the other European allies went along with the British position on the issue. British officials were generally respectful of the suffering of their allies on the continent but when it was Britons who were suffering, the British government was quick to anger.<sup>39</sup> And while Britain and America sparred over trial plans, there was no controversy about drafting a special “Royal Warrant” for putting Germans who had abused British soldiers before a British military tribunal.<sup>40</sup> The British seemed to want justice both ways; legal and political. Those deemed the worst, mainly the leadership of the Nazis, would suffer under political justice while the rest would be given some due process. But if democratic values and ideals were to be demonstrated in the Nuremberg Trials, as America convinced Great Britain, then all accused would have to be brought before a court. This is the true success story of the Nuremberg Trials. Along with the groundbreaking progress in international law that was made, summary executions were avoided despite the popular desire for them. Although the legalistic aspects of Nuremberg are questionable when compared to today's standards, the fact is

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<sup>38</sup> Ibid., 33.

<sup>39</sup> Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000): 192.

<sup>40</sup> Ibid., 193.

that trials did happen and can be looked back on as perhaps the greatest episode in the practical application of international law.

The foremost issue that the IMT brought forth with respect to the Euro-American relationship is how democratic powers should exercise international justice. The Europeans, with their deep and authoritarian past, initially found summary executions for the worst criminals and immediate recompense more acceptable than the United States did. In many ways, the British view was a realist's view that was more desirable to the general public because men like Hitler, Goebbels, Keitel and Hess did not deserve a trial. America, with a short and liberating history, was able to conjure up a more liberal view of the situation claiming that no matter how bad and evil the accused were, they all should be formally brought before a court in order to properly charge and punish them. A large contributing factor to the different attitudes that cannot be ignored is that, although the United States gave much support and lost many soldiers, America did not nearly suffer as much as Europe did. It was not Washington D.C. that was being bombed and it was not Ohio that was being occupied. The United States would have almost certainly taken a different view if it had been Washington D.C. and Ohio. It was understandable why the British and the rest of the European allies felt as they did because the suffering experienced in the Second World War was much more personal to them. In the end the Europeans fell back on their shared democratic principles and opted for the trials and helped establish an important signal stating that organizations such as the Nazis would never be tolerated again.

### **C. A BIG MISTAKE: EVENTS BETWEEN IMT AND ICTY**

The UN International Law Commission, upon request of the General Assembly with Resolution 260 in 1948, submitted a conclusion that recommended the “establishment of an international court to try persons charged with genocide or other crimes of similar gravity.”<sup>41</sup> The General Assembly, however, postponed actions to create such a court because it was felt, officially, that an agreed definition of law needed

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<sup>41</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide – taken from Rome Statute of the International Criminal Court ‘Overview’ webpage, located at: <http://www.un.org/law/icc/>, [accessed 6 December 2002].

to be adopted. Unofficially, it was evident after the conclusion of the Nuremberg Trials (and Tokyo as well) that there was some reluctance to push ideas to create an international criminal court or further efforts to improve upon the precedents established by the IMT. Perhaps there was a feeling that such atrocities as those committed in the Second World War would not happen again:

For nearly half a century - - almost as long as the United Nations has been in existence - - the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought...that the horrors of the Second World War - - the camps, the cruelty, the exterminations, the Holocaust - - could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time this decade even - - has shown us that man's capacity for evil knows no limits. Genocide...is now a word of our time, too, a heinous reality that calls for a historic response.

- Kofi Annan, United Nations Secretary General

A historic response that should have occurred within a few years after Nuremberg, namely the creation of an international criminal court, was not followed through and this was a big mistake. Perhaps the onset of the Cold War put most international progress on hold until the dissolution of the Soviet Union made renewed progress possible. Perhaps the world, and Europe in particular, just wanted to bury the past instead of re-opening old wounds by continuously revisiting the events of the Second World War and the Nuremberg Trials in order to make improvements. Many similar speculative counts can be made to excuse the slow-down in progress and the stagnation of effort to establish a viable international legal framework for prosecuting the world's worst criminals. At the core of all these explanations, however, is the fact that it became acceptable to forget about the need to reform international criminal law. Although the logic to establish some sort of international criminal framework was present during and after Nuremberg, this logic did not dominate the action of the international community.<sup>42</sup>

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<sup>42</sup> "International community" here is primarily referring to the United States and the European Allies, although other countries began to take great interest in international law by this point in history.

#### **D. THE ICTY: THE HAGUE AND TRIBUNAL INADEQUACY**

World leaders failed to continue upon the logical improvements needed to restructure international law after the Nuremberg Trials. What happened in Europe during the Second World War, including the Holocaust itself, seemed to be of less significance during the age of socialists versus capitalists, nuclear arms, and the space race. People concerned themselves less and less with international justice and more with the Soviet and American rivalry. This may be why a great “confusion and paralysis of the United States and Western Europe [arose] in dealing with the most brutal conflagration in Europe since the end of World War II;”<sup>43</sup> the grotesque events in Bosnia. It sadly took other episodes of genocide for the world to remember the horrors that men are capable of and to reopen the books on reforming international criminal law. The problem, however, is that as the events in the former Yugoslavia were occurring there was no time to negotiate and establish the once sought-after formal international court because genocide was in progress; action was imperative.

The only viable option left was to establish an ad hoc tribunal of the sort used at Nuremberg. “All that remained of some of the Clinton administration’s boldest proposals for dealing with the carnage was a war crimes tribunal.”<sup>44</sup> Much effort was made to ensure that this tribunal would avoid the failures of the IMT. Many considered the idea for a tribunal as hollow and in fact argued that a tribunal would aggravate the situation. Both British and French diplomats hinted that they would be willing to eliminate the tribunal if that was the price exacted by the Bosnian Serbs for signing a peace agreement but the United States would never associate itself with a peace agreement that did away with the tribunal; there had to be some kind of formal settling of accounts.<sup>45</sup> Surprisingly, Europe viewed the situation much differently than the United States. Whereas the Americans saw the occurrences in Yugoslavia as another Holocaust that had to be stopped, Europeans saw it as “an endless quagmire for European soldiers.”<sup>46</sup> For

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<sup>43</sup> Stanley Meisler, *United Nations: The First Fifty Years* (New York: The Atlantic Monthly Press, 1995): 312.

<sup>44</sup> *Ibid.*, 328.

<sup>45</sup> *Ibid.*, 329.

<sup>46</sup> Gary J. Bass, *Stay the Hand of Vengeance*, 222.

the most part, Europeans felt that if they started deeming particular ethnic groups involved in the conflict as criminal, this would escalate the conflict thus putting European soldiers already on the ground as part of the UN Protection Force (UNPROFOR) in danger. This is why most European diplomats, namely British and French, would have accepted a peaceful solution even if it meant that criminal proceedings would be excluded. In other words, it was feared that public indictments would derail any attempts at cease-fire negotiations. The United States did not have forces on the ground and thus did not have to consider the endangerment of American soldiers. As such, demanding the creation of the ICTY (International Criminal Tribunal for the former Yugoslavia) was a much easier task for the United States than it was for the Europeans. Since American involvement would eventually be needed to ensure the success, specifically in the 1995 NATO air campaign into Bosnia, the Europeans did not want to appear as blocking a tribunal even though they did not support it.<sup>47</sup> By May of 1996, the first accused war criminal, Dusan Tadic, was standing before the new UN criminal tribunal, the ICTY.

To avoid the risk of falling into the Nuremberg trap of a politically motivated process, the statutes of the Hague Tribunal have made it perfectly clear that complaints similar to those concerning the Nuremberg tribunal's use of *ex post facto* laws will not resurface, nor will they be tolerated. In his commentary on the statute approved by the UN Security Council, Secretary-General Boutros Boutros-Gali stated that "the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence does not arise." At this point, the Nuremberg Principles were considered customary law along side the Geneva Conventions, the Hague Conventions, and the Convention on the Prevention and Punishment of the Crime of Genocide.

The negative side to all this is that, while the Hague Tribunal is doing a great job of avoiding the "victor's justice" syndrome of Nuremberg, it faces other challenges that the Nuremberg Tribunal did not face. Since there is not a group of powerful victors to support and ensure the Hague Tribunal's success, four major problems have arisen for the ICTY: 1) It has minimal power to punish and thus, with no power to enforce arrests of

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<sup>47</sup> Ibid., 222-227.



suspects, those indicted who fail to turn themselves in (or if their government fails to arrest and turn them in) face little risk since, unlike Nuremberg, there can be no trials in absentia. 2) One of the acclaimed differences of the ICTY and the IMT is that the ICTY is supposed to try all defendants and not just major political or military leaders – and this is proving very difficult. 3) A lack of funds due to other UN operations has slowed down the process and has embarrassingly led to reliance on some voluntary contributions. Initially, the United States gave \$3 million and some twenty-two staffers. Many complained that Americans were trying to dominate the court. Great Britain gave \$30,500 and one staffer. France gave nothing. Even Sweden and Denmark were more generous than Great Britain.<sup>48</sup> 4) The ICTY faces an enormous task in gathering incriminating evidence for use at trial. In contrast, the Nuremberg Tribunal had the benefits of extensive documentation and Nazi records whereas records and physical evidence in the former Yugoslavia are scarce and in many cases have been tampered with.<sup>49</sup> In summary, mandating that a thorough legal framework will govern the ICTY has at the same time compromised the efficiency and timeliness under which it can operate.

The biggest problem for the ICTY is that it has not ensured that all guilty parties in the Former Yugoslavia are being brought to justice or that peace has been secured. The broader context of what has thus far transpired at the Hague Tribunal has put the whole idea of *ad hoc* tribunals into question. Yugoslavia and Rwanda have not been the only countries to witness atrocities in recent times - the killing fields of Cambodia, the so-called disappearances in Argentina, chemical weapon use in Iraq against the Kurds, and the very controversial use of force in Palestine and Israel – why have ad hoc tribunals not been formed to handle these equally serious matters? The fact that tribunals are selectively used has created the perception that a portion of those who commit international crimes, such as humanitarian violations, can escape punishment. Although

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<sup>48</sup> Financial figures come from Gary J. Bass, *Stay the Hand of Vengeance*, 222.

<sup>49</sup> The four major problems with the ICTY are paraphrased from Mark A. Bland, “An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the former Yugoslavia: Parallels, Problems, and Prospects,” Indiana University School of Law Doctoral Thesis, 1995. For further supporting comments see “Bringing War Criminals to Justice: Obligations, Options, Recommendations,” *University of Dayton Center for International Programs*, located at:

<http://www.nesl.edu/center/warcrim1.html>, [accessed 15 Feb 2003].

the ICTY did go through painful efforts to avoid politicization and establish itself on a legal basis, the problems with ad hoc justice were again highlighted and, as with the Nuremberg Trials, the logical solution was to create a permanent international criminal court. It would seem that the world should now be ready to take serious action to ensure the creation of an international criminal court but both legal and political obstacles have presented themselves.

The ICTY is only now beginning to be assessed and written about. The ICTY's legacy will be carried forward with both supporters and critics. Critics focus on the fact that some of the most notorious indictees remain unpunished (and indeed, at liberty) while the most infamous leader of the conflict, Slobodan Milosevic, was only indicted over four years after the initial rounds of indictments. His trial only began in February 2002 (The ICTY was officially established in 1993).<sup>50</sup> Harsher critics claim that the ICTY was simply a cost-effective effort by some nations to relieve their guilt about not having intervened in a more meaningful way in the former Yugoslavia prior to 1995.<sup>51</sup> Supporters argue that the tribunal has made every effort to ensure just and fair trials through a well-established legal framework to avoid the "victor's justice" effects of the past.<sup>52</sup> How history will judge the ICTY's proceedings is yet to be seen. The current path of progress being made in the Hague is inadequate, despite its apparent improvement upon Nuremberg. Today, people expect more from an international institution of law than they did in 1946. If this path is continued upon, it will become very difficult to make a persuasive argument that the ICTY is making a noteworthy contribution to international criminal law or that it is deterring future war criminals from their exploits.

With regards to the Euro-American relationship, the ICTY is proving, like the Nuremberg Trials, that in the end legalism triumphs over revenge and that dismissing the atrocities altogether is out of the question. Europe wanted to initially throw out trials for the accused in Yugoslavia just as they initially wanted to throw out trials for the top Nazi

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<sup>50</sup> At the UN/ICTY website, located at: <http://www.un.org/law/icty/>, [accessed February 5, 2003].

<sup>51</sup> Sean D. Murphy, "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia," *American Journal of International Law*, Vol. 93, Is. 1 (Jan., 1999): 95.

<sup>52</sup> Payam Akhavan, "Beyond Impunity: Can International Justice Prevent Future Atrocities?," *American Journal of Law*, Vol. 95, Is. 1 (Jan, 2001): 7-31.

leaders. Again, both counts of atrocities happened on European soil and thus were of a more personal nature for the Europeans than for Americans; especially since the world failed to prevent horrific acts that everyone promised would happen “never again.” The United States was able to, once more, act like the generous helping hand to Europe by ensuring that the allies did not stray from the course of just and legal proceedings. Europeans may have resented this somewhat. Overall, however, the blame could be put on both the United States and Europe for only making a symbolic effort to set up a tribunal but more importantly for not stopping the brutal slaughter in the beginning of the conflict when there was opportunity to do so – “no war crimes, no war crimes trials.”<sup>53</sup> If Europe and the United States joined together to take three steps forward along the path of international justice at Nuremberg then they once more joined at the Hague to remain at best idle or even taking a step backward.

#### **E. THE EXTREMES OF INTERNATIONAL CRIMINAL JUSTICE**

The IMT in Nuremberg and the ICTY in the Hague were established in markedly different historical contexts. The war in the former Yugoslavia did not end with the unconditional surrender of the defeated, as in the Second World War, but rather through diplomacy and negotiation. The Nuremberg Trials were the result of the victorious occupying powers forcefully administering justice. “Victor’s justice” and “political show trials” are common terms used by some critics to describe the lack of legal foundation of the IMT. This is not the case for the Hague Tribunal. Although one could argue that a political agenda does exist, this political agenda is definitely overshadowed by a highly refined legal framework. “Victor’s justice” and *ex post facto* laws have, without argument, been erased from the Hague – that is, the ICTY ensures that there can be no crime and subsequently no conviction or punishment without a pre-existing law, without adequate evidence, or without other essential elements of a well-established legal framework.

The results of these tribunals are, however, quite surprising because the IMT, for the most part, is considered a success in that it adequately fulfilled the requirements of its

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<sup>53</sup> Gary J. Bass, *Stay the Hand of Vengeance*, 283.

day, while the ICTY seems to be inadequate and failing to live up to the standards that were set for it to achieve. Some argue that the ICTY is coming along slowly but surely. However, the process is indeed slow, and will likely result in soft punishments and in some cases no punishments at all. It should also be noted that, although the Nuremberg Trials are considered a success for its day, its prosecution of *ex post facto* law and political slanted-ness would never be tolerated or accepted today. The best summation when comparing the two tribunals comes from perhaps the foremost book on the issue to date, *Stay the Hand of Vengeance*, by Gary Jonathan Bass: “What made Nuremberg suspect made it strong; what made The Hague unimpeachable made it weak.”<sup>54</sup>

What seems to have been established are extremes of international criminal justice: on one end there is a justice system dominated by politics, as in the case of the Nuremberg Trials, and on the other end there is a justice system dominated by respect for legal procedure, as in the case of the ICTY. It is apparent that neither extreme can produce an adequate result to satisfy today’s standards and expectations. Perhaps a more balanced solution between the political and legal aspects of international justice would produce a more desirable outcome. Whatever the solution, it is clear that some type of reform is needed to provide proper and prompt justice. This solution may lie between the extremes set by Nuremberg and the Hague and is necessary in order to ensure the success of future international criminal institutions whether in the form of other ad hoc tribunals, the ICC or international justice systems yet to come. This is the situation that Europe and the United States now face in their argument for or against a permanent court.

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<sup>54</sup> Ibid., 282.

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### III. BEYOND NUREMBERG AND THE HAGUE: THE ICC

Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms? The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of the confederacy; the booty is divided by the law agreed on. If by the admittance of abandoned men, this evil increases to such a degree that it holds places, fixes abodes, takes possession of cities, and subdues peoples, it assumes the more plainly the name of a kingdom, because the reality is now manifestly conferred on it, not by the removal of covetousness, but by the addition of *impunity*. Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that King had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, “What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor.”\*

- St. Augustine, *The City of God* (354 – 430), The Foundation of the State  
\*Cicero, *De Republica*, III

...there may be controversy between two princes, where the one is not subject to the other, either from the fault of themselves, or even of their subjects. Therefore between them there should be means of judgment. And since, when one is not subject to the other, he cannot be judged by the other (for there is no rule of equals over equals), there must be a third prince of wider jurisdiction, within the circle of whose laws both may come.

- Dante, *De Monarchia* (1265 – 1321), The Need for Authoritative Settlement of Disputes Between States)

The small country of Trinidad and Tobago, suffering from high crimes and murders caused by drug trade, suggested in 1989 that the UN resume its work to establish a permanent criminal court as a venue to prosecute drug traffickers. This and other efforts led to creation of the Rome Statute, which founded the ICC and entered into force in July 2002. With a majority of the world’s nations in support, there were 139 signatories with 81 states party to the treaty by July 17, 2002.<sup>55</sup> Despite this apparent success in establishing the world’s first criminal court, absent from the treaty was the one

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<sup>55</sup> Taken from Rome Statute of the International Criminal Court ‘Status of the Treaty’ webpage, located at: <http://www.un.org/law/icc/>, [accessed 6 December 2002].

country that has been looked upon as the premier moral and human rights leader in the post-World War II era - the United States. (In July 1998 in Rome, members of the United Nations voted to adopt the treaty of the Rome Statute - the final vote was 120 in favor, 7 opposed, and 21 abstentions.) The United States found itself in company with countries considered the enemies of human rights, with China, Iraq, Libya, Qatar, Sudan, and Yemen also against the Court.<sup>56</sup> “It was an embarrassing low point for a government that portrays itself as a champion of human rights.”<sup>57</sup> This chapter will examine different views and opinions with respect to the ICC, the United States’ decision to not become a member of the court, and most importantly the effects this is having on the Euro-American relationship. The goal is not, necessarily, to take a side of the debate but rather to show some of the strengths and weaknesses of the arguments. The ICC is one of the stand-out issues that may be damaging the trans-Atlantic alliance, owing to the failure of Europe and the United States to come together and create a system, whether in the ICC or in another forum, to address international criminal justice.

#### **A. A CRITICAL VIEW: WHY THE UNITED STATES OPPOSES**

The American political figure most committed to blocking the ICC is Senator Jesse Helms (R-NC), Chairman of the Senate’s Committee on Foreign Relations. In June of 2000, at a Congressional Hearing concerning the court, the adamant Senator warned that one day American servicemen and officials might be seized, extradited and prosecuted for war crimes. The seizure of General Pinochet<sup>58</sup> was a hot and controversial issue then, and Helms quoted a *New York Times* article which commented on the Pinochet capture: “...and I am quoting the Times, ‘The FBI has warned several former U.S. officials not to travel to some countries, including some in Europe, where there is a

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<sup>56</sup> Ruth Wedgwood, “Fiddling in Rome,” *Foreign Affairs* (November/December 1998): 20.

<sup>57</sup> Kenneth Roth, “The Court the U.S. Doesn’t Want,” *The New York Review of Books* (19 November 1998): 45.

<sup>58</sup> On October 17, 1998, General Augusto Pinochet was arrested in London on a warrant from Spain requesting extradition on murder charges. Spain was investigating Pinochet over the murders of Spanish citizens while Pinochet had held power in Chile between 1973-1990. Pinochet was in London on a diplomatic passport (as a Senator) and was recovering from back surgery. Typically foreign diplomats are granted immunity. The Chilean Foreign Ministry lodged a protest with the British government over the arrest. Through much liberation, Pinochet was released and faced a minor reprimand from the Chilean government involving his removal from the Chilean senate and kidnapping charges; not murder charges.

risk of extradition to other nations interested in prosecuting them,’ end quote from the Times article.”<sup>59</sup> Senator Helms had also previously sent a letter to Madeline Albright, then Secretary of State, stating that any treaty establishing a permanent criminal court would be “dead on arrival” in the Senate unless Washington retained some form of veto power over it.

The Clinton administration’s general policy toward the Court was supportive. Secretary Albright and David J. Scheffer, who held the newly created post of Ambassador-at-Large for War Crimes Issues, were the two officials in charge of ensuring that the American requirements were incorporated into the treaty. When the final treaty was passed in July of 2000, many world diplomats cheered – many except Ambassador Scheffer who failed to convince the other signatories that a provision stating that Americans would remain immune to the Court should be included in the treaty. All along President Clinton himself knew, by the warning of several on Capitol Hill, that the treaty would never be ratified, especially as long as the Republicans controlled both houses of Congress. Partisan politics may have contributed to controversy over the Court, but there are two major areas where there is not a clear division of opinion between the two parties. The first issue is concerned with the incrimination of American servicemen, and the second is the everlasting debate about universal jurisdiction of international institutions.

### **1. Endangering Service Members**

The foremost concern that opponents like Senator Helms cite is the possibility that the ICC could bring politically motivated charges against U.S. military personnel and political officials. One example that many critics often use is the American bombing campaigns over Germany and Japan during the Second World War. Could the United States, its leaders and its soldiers, be guilty of war crimes for bombing unintended targets and failing to avoid killing innocent civilians during these aerial assaults? Indeed, many critics fear that this is how those wishing to prosecute Americans for political purposes can interpret the provisions and it would be very difficult to defend against these charges,

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<sup>59</sup> Congress, Senate, Committee on Foreign Relations, *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 14 June 2000, 1.



especially when examining such cases as the decision to drop atomic bombs on Hiroshima and Nagasaki.<sup>60</sup>

That is why Senator Helms, supported by Congressman Tom DeLay (R-TX) in the House, led the way in creating the American Servicemembers Protection Act (ASPA). The bill not only bars any U.S. cooperation with the court, but also bars U.S. military aid to other countries unless they agree to shield U.S. troops on their territory from ICC prosecution. It also bans U.S. troops from taking part in UN peacekeeping operations unless the UN Security Council explicitly exempts them from possible prosecution.<sup>61</sup> One version of the bill, which is still being discussed in Congress, would open the way for the president to use force to free U.S. prisoners hauled before the ICC, which is to be located at The Hague, in the Netherlands. The Bush administration endorsed the ASPA on the condition that the President is given the authority to waive any of its provisions if he determines it is in the national interest to do so. As laughable as it may seem to imagine the United States having to invade the Netherlands to bust out Americans brought before the ICC, if the day ever comes when an American is indicted by the Court it may not be a joking matter.

Clearly, the United States has global security obligations that no other country is willing to undertake. People, throughout the world, look to America for stabilizing hostile regions in order to ensure the common values of humanity and the security of global markets. Some U.S. diplomats feel America cannot meet those responsibilities when the people they assign to carry out those duties are subject to prosecution by anyone who does not particularly care for America.<sup>62</sup> Recent times have shown that there is a great amount of American resentment in certain areas of the world. “The fairly extensive role the U.S. military has taken around the globe makes it leery of being tried

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<sup>60</sup> John R. Bolton, “Courting Danger,” *The National Interest* (Winter 1998/99): 66.

<sup>61</sup> Information on the ASPA taken from the United Nations Association of the United States of America (UNAUSA), “The American Service Members’ Protection Act of 2001: Implications for U.S. Cooperation with the ICC (fact-sheet on-line), located at:

<http://www.unausa.org/newindex.asp?place=http://www.unausa.org/policy/newsactionalerts/advocacy/iccfact.asp>, [accessed 4 February 2003].

<sup>62</sup> Congress, Senate, Committee on Foreign Relations, *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 14 June 2000, 7.

by a tribunal it can't control.”<sup>63</sup> Clearly, the Bush Administration's National Security Strategy has made this attitude the official U.S. policy:

We will take all actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept. We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect U.S. nationals from the ICC. We will implement fully the American Servicemembers Protection Act, whose provisions are intended to ensure and enhance the protection of U.S. personnel and officials.<sup>64</sup>

It is doubtful that the ICC will have a beneficial impact on international security, at least in terms attempting to end conflict with political dialogue. Among the oldest tricks in the diplomat's toolbox is the proposition that if you want to make a negotiated peace you may need to waive punishments for previous offenses. This is especially true of conflicts settled by compromise and can be significant in bringing a lopsided victory to a close and, in essence, shorten the duration of conflicts. As discussed in chapter two, this is why British and French officials did not want to implement the ICTY at the beginning of the Bosnian conflict - they feared it would only escalate hostilities. It is highly important, however, in the cases where a decisive victory is not in achievable at acceptable cost, that the threat members of the losing side face under the ICC not undermine efforts for a peace settlement.<sup>65</sup> Fighting men could be called upon to compromise, to lay down their arms, and give up power as long as they are assured that there will be no severe retribution for their actions. This concept has long been a time-honored device but the ICC stands to eliminate this option for peace. The bottom line is that, from an American perspective, having an ICC may be a higher risk to fighting

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<sup>63</sup> Quoted from an interview with Stephen M. Walt, Professor of International Affairs at the Kennedy School at Harvard, in: Serge Schmemmann, "U.S. vs. U.N. Court: Two Worldviews," *The New York Times*, 2 July 2002. Sec A. p.8, col. 3.

<sup>64</sup> The White House, Washington, *The National Security Strategy of the United States of America*, (September 2002) chapter IX – Transform America's National Security Institutions to Meet the Challenges and Opportunities of the Twenty-First Century, 31.

<sup>65</sup> David C. Hendrickson, "Toward Universal Empire: The Dangerous Quest for Absolute Security," *World Policy Journal* (Fall 2002): 5.

soldiers and may serve to draw out conflicts that may have otherwise been settled diplomatically.

## **2. The Unacceptability of Universal Jurisdiction**

The idea behind universal jurisdiction is recognizing that some crimes are so heinous that their perpetrators should not escape justice by hiding under the protection of their government, or by fleeing to countries that either are not concerned, unaware, or unable to respond; where punishments are soft or non-existent.<sup>66</sup> This is a noble concept and was the driving force in Nuremberg and still is the main reason why the ICTY continues its process. In the past, ad hoc tribunals (such as the Nuremberg Trials and the ICTY), national courts, or military summary courts have been used to fulfill the goals of universal jurisdiction. They are not referred to in terms of universal jurisdiction, however, because these bodies were designed to be temporary, only applied to designated individuals, groups or countries (thus not universal) and in general have worked well to serve the circumstances they were created to serve. The ICC is designed to take over as a permanent institution to service the all-encompassing definition of universal jurisdiction.

One critical issue is the relationship between universal jurisdiction and national reconciliation as experienced, for instance, by Europe after the Second World War.<sup>67</sup> It is an important principle that those who commit war crimes or continually violate human rights should be held accountable. There may, however, be an even more important benefit of helping a country or a people to recover from these crimes simply by designing a tribunal specially tailored to rule on a specific account such as Nuremberg and the ICTY. Simply having a court within the borders where atrocities occurred can have some healing power because the afflicted people can then feel a sense of connection with the process of justice. The ICC is broad and vague in its jurisdiction and is not tailored to specific events. Both the ICC and the ICTY are located in the Hague. The ICTY, however, may have had a more personal meaning to the afflicted masses in the former Yugoslavia if the court would have been located in Bosnia or Kosovo or even both. Keep

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<sup>66</sup> Henry Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs* (July/August 2001): 86.

<sup>67</sup> Ibid.

in mind that the ICC is allowed and, in fact, required to cede jurisdiction to national courts if they are willing and able to function.

The claim of universal jurisdiction is furthermore in violation of established international rules concerning treaties and undermines state sovereignty, setting a dangerous precedent. Unlike other international treaties, the Rome Statute specifies that once the ICC comes into existence, it may exercise jurisdiction over personnel of states that are not party to the treaty. However, Article 34 of the Vienna Convention on the Law of Treaties states that “A treaty does not create either obligations or rights for a third state without its consent.”<sup>68</sup> Thus, another major point critics make is that the ICC undermines the sovereignty of nations and violates the Vienna Convention. On the other hand, supporters argue that it is necessary to ensure all violators can be brought to justice.

### **3. Overall Success Doubtful**

The ICC will not likely achieve its goal of deterring heinous crimes because it does not (and should not) have sufficient authority in the real world. There is no evidence that affirms the Court’s deterrent capability, primarily because the ICC is only now coming into existence and thus every analysis of the Court at this point is purely speculative.<sup>69</sup> Moreover, it takes a certain amount of political will for a single country or a group of united countries to stand up to men, organizations, and governments that commit heinous acts. Advocates of universal jurisdiction, implemented through mechanisms such as the ICC, would argue that because the state is the basic cause of war then it could not be trusted to deliver justice. These supporters would uphold that if law replaced politics, then peace and justice would prevail. But even a shallow examination of history, even limiting the scope to Europe during the Second World War and Yugoslavia in the 1990’s, shows that there is no evidence to support such a statement. Even if law could replace politics, then there would be the risk of a tyranny of judges replacing the tyranny of statesmen. “The role of the statesman is to choose the best

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<sup>68</sup> United Nations, *Treaty Series*, vol. 1155: 331.

<sup>69</sup> Congress, Senate, Committee on Foreign Relations, *Is a U.N. International Criminal Court in the U.S. National Interest?*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 23 July 1998, 29.

option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial.”<sup>70</sup>

A popular assumption for Americans is that the Europeans are much more open to international institutions, such as the ICC, because their efforts to consolidate over the years have resulted in many common institutions. Different countries, mainly through the coordination of the EU, have adopted these institutions. The idea is that the member countries surrender part of their sovereignty to supranational European institutions. There is even a European Court of Justice that ensures that the conflicts between member-states are resolved but more importantly ensures that overall community law does not come into conflict with any one country’s law; and if it does then usually the community law wins out. This European court, however, is more similar to the UN International Court of Justice (ICJ) than it is to the ICC, at least in the sense that it is not a criminal tribunal, but rather one that rules on questions of due process, legal jurisdiction, and so on. To date there is no purely criminal court for the whole of Europe that tries individuals on criminal grounds. This fact has led many like Professor of Government, Jeremy Rabkin from Cornell University to inform policy makers that it should be of no surprise that the United States and others are reluctant to consider such a court: “If you look at the European Union, they have now a common flag, they have common passports, they have a common parliament, they have all these common institutions. One institution which they do not have is a common criminal court, because the countries of Europe, which are willing to share a lot of power, are not willing to share that.”<sup>71</sup> Then why are all the countries of Europe willing to create a criminal court with global jurisdiction if they are not even willing to create such a court for their own region? Perhaps they feel that the ICC itself is filling both a regional and global role and that it would only duplicate effort. The answer is not exactly clear but surely the Europeans should not be opposed to the idea of a European Criminal Court. If the people of Europe want to surrender their individual countries’ sovereignty and fall under the rule and

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<sup>70</sup> Henry Kissinger, “The Pitfalls of Universal Jurisdiction,” *Foreign Affairs* (July/August 2001): 86.

<sup>71</sup> Congress, Senate, Committee on Foreign Relations, *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 14 June 2000, 9.

judgment of one European body then that is their business, but the United States should not be expected to surrender its sovereignty to fall under the rule and judgment a similar sort of global body – that body in form of the ICC or any form for that matter.

## **B. THE SUPPORTING VIEW: WHY EUROPE IS IN FAVOR**

In the last 100 years or so, millions of people have been killed by crimes of genocide, crimes against humanity and war crimes.<sup>72</sup> After Nuremberg, there was a hope that there would be a “permanent Nuremberg,” - that people like Hitler everywhere around the world would be prosecuted in an international criminal court. The Cold War may have been a big reason this was prevented. It may be that the failure to prosecute men such as Pol Pot, Idi Amin, and Saddam Hussein has only encouraged acts like Karadzic and Milosevic. There is no incontrovertible proof that an international criminal court is an effective deterrent to such men, but not having an international criminal court is definitely an encouragement.<sup>73</sup> The ICTY does have roughly half of the listed indictees in its custody and this includes all the major leaders considered to be the masterminds of the genocide. At a minimum, there is no reason to assume that a working system of international criminal justice would be any less effective as a deterrent than are comparable systems within nations.

An additional argument for the ICC is that the UN Security Council may not be able to create ad hoc tribunals for every circumstance requiring them. The term “tribunal fatigue”<sup>74</sup> refers to the expensive and politically exhausting process that the Security Council undergoes when creating new courts, requiring new judges, new courtrooms, staffing, and so on. This is why the world turned to the idea of a permanent court; so that this tedious process does not have to be endlessly repeated. Avoiding “tribunal fatigue” makes the ICC a worthy cause. When looking at the two biggest gripes that critics have

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<sup>72</sup> Congress, Senate, Committee on Foreign Relations, *Is a U.N. International Criminal Court in the U.S. National Interest?*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 23 July 1998, 34.

<sup>73</sup> Taken from statement made by Michael P. Scharf, Professor of Law and Director, Center for International Law and Policy, New England School of Law. Congress, Senate, Committee on Foreign Relations, *Is a U.N. International Criminal Court in the U.S. National Interest?*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 23 July 1998, 35.

<sup>74</sup> A term often used by David Scheffer, the Ambassador-at-Large for War Crimes Issues under the Clinton Administration, who represented the United States during the creation of the ICC Treaty.

with the Court - endangering service members and universal jurisdiction - the proponents have put their own positive angle on these issues.

### **1. Service Members Should NOT Fret the Court**

It seems that the United States has overemphasized the risk that an American may have to face the ICC, while it has underemphasized the ICC's potential to save lives.<sup>75</sup> It has not been clearly established that the ICC will be able to deter international criminals, but even if an effective ICC only occasionally makes a tyrant think twice before committing atrocities then this could translate into lives saved. This has not, however, been considered as important to American diplomats as the vulnerability the ICC may impose on American servicemen. But American soldiers are already vulnerable to foreign courts whether the ICC exists or not. The same applies to American tourists and visitors living abroad. There are exceptions when the United States obtains a letter of agreement with the hosting country such as the military often does with Status of Forces Agreements (SOFA). Under such arrangements the host country agrees to turn over suspected American criminals to United States officials. While the Rome delegates did not entirely rule out the possibility of an American being prosecuted, they provided substantial protection against unjustified prosecutions. Since it is not U.S. policy to commit genocide, crimes against humanity, or war crimes, American soldiers and officials are very unlikely to come under the ICC's jurisdiction and this should alleviate any of their fears.<sup>76</sup> And if an American commits such crimes outside of the United States then the United States may not be only country with rights to prosecute that individual. That is where the ICC could intervene and ensure that the guilty party does not go unpunished or that any aggrieved country does not over-punish the guilty. However, and as it will later be discussed, the ICC would first allow the United States to try American indictees and as long as the result of the trial was deemed legitimate then the ICC would not become involved at all.

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<sup>75</sup> Kenneth Roth, "The Court the U.S. Doesn't Want," *The New York Review of Books* (19 November 1998): 47.

<sup>76</sup> Ibid.

To add more comfort to those that fear the Court, the ICC Treaty protects all bilateral agreements exempting U.S. troops stationed abroad from local criminal justice.<sup>77</sup> Terms can now be added to the existing SOFAs and included in new agreements to protect U.S. troops from international turnovers as well. Let it not be forgotten that most international dialogue is open and official, but some diplomacy is less formal and often occurs quietly and without much public disclosure. The United States retains considerable soft power, which leaves many ways of dissuading governments from attempting to try an American.<sup>78</sup> These include everything from diplomatic and economic pressure to the threat of military force. This kind of persuasion may not be a perfect fix (a perfect fix would be altering the treaty itself) but it could be a meaningful way in which the United States could at least support the Court and continue its important security role even if it does not sign the treaty.

## **2. The Good of Universal Jurisdiction**

The ICC, in one sense, may adequately address concerns about universal jurisdiction through the principle of *complementarity*. That is, the ICC will first defer to the national systems of justice to investigate and prosecute allegations against citizens of any given country. Only when the Court determines that the national system is either unable or unwilling to fulfill these responsibilities, or that it has not done so in good faith, will it assert its jurisdiction. The national courts are to be given priority and the chance to handle cases first before the ICC can do so. Again, the ICC will step in if local courts have collapsed or the country shows a “genuine unwillingness” to conduct a thorough trial.<sup>79</sup> The American justice system is widely recognized as a model of legitimate due process and it would be unimaginable that the ICC would not accept the ruling of American courts.

Some confusion has arisen over the meaning of the term “statute” and its implications. In domestic terms, a statute is a law passed by a legislature and once passed

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<sup>77</sup> Ruth Wedgwood, “Fiddling in Rome,” *Foreign Affairs* (November/December 1998): 23.

<sup>78</sup> Kenneth Roth, “The Court the U.S. Doesn’t Want,” *The New York Review of Books* (19 November 1998): 46.

<sup>79</sup> Ruth Wedgwood, “Fiddling in Rome,” *Foreign Affairs* (November/December 1998): 22.



that law applies to all citizens that are represented by the legislature. If a particular citizen does not agree with the statute, if the citizen voted against the statute or did not vote for the officials represented in the legislature, it would not matter and that citizen would still be subject to the law created through that statute. It is much simpler in international diplomacy. An international statute is simply a treaty between countries establishing law for the countries who are party (sign and ratify) to the treaty. This international definition of “statute” generally applies to all treaties, including the Treaty of Rome (also referred to as the Rome Statute or ICC treaty), which founded the ICC.

As noted earlier, Article 34 of the Vienna Convention on the Law of Treaty states, “A treaty does not create either obligations or rights for a third state without its consent.” The United States, now with its signature removed from the treaty, claims that it is not subject to the jurisdiction of the ICC. However, the United States does support and abide by other international agreements that it has not ratified, and it also expects other countries to support and abide by them regardless of whether they have signed. Nuremberg held German officials liable to the Geneva laws even though Germany was not a signatory of those conventions at the time. For a current example, the United States has not ratified the UN Convention on Law of the Sea, yet it routinely sends the U.S. Navy to conduct Freedom of Navigation operations (FONOPS) on countries that claim seas beyond the scope of the treaty, whether those countries have signed and ratified the treaty or not. So how is the ICC treaty any different? Obviously, it is different only because the most powerful country opposes it. The fact is universal jurisdiction has helped the United States enforce international law in the past and presently issues such as freedom of seas, even if it does seem to contradict the Vienna Convention. Apparently, applying this concept to the ICC treaty is all of a sudden inconvenient.

### **3. Hopeful Prospects**

The EU and other supporters of the ICC have pledged to continue their work with or without the United States. The EU sees this as an opportunity to fill the leadership role of an important international institution that everyone expected to be led by the United States. Imagine if the United States got what it wanted – an ICC under the UN Security Council with veto power over prosecutions. Here is the scenario:

Russia could have vetoed prosecution of the Serbs for crimes in Bosnia, or of Saddam Hussein for using poison gas against the Kurds. France could have blocked prosecution of Rwandan officials for the 1994 genocide. China could have turned thumbs down on a trial of Pol Pot and his Khmer Rouge colleagues for the Cambodian holocaust. Britain could have stopped the prosecution of Nigerian officials for the Biafra slaughter. And the United States could have ensured that the leaders of the death squads of the 1980s in El Salvador were never brought to trial. Only defendants from countries lacking a protector among the permanent five would ever find themselves in the dock. In addition, of course, the five permanent members would guarantee their own immunity, so that, for example, the crimes of Russia in Chechnya or of China in Tibet would have been untouchable.<sup>80</sup>

Better to have no court at all than one so grossly flawed. For this reason, there is no way to establish an effective ICC while giving the United States a guarantee that Americans would never be brought before the Court. “If the U.S. says ‘we are from a different nature, we cannot be compared with others, discipline is good for others, but not for the United States,’ then the future of humanity is at stake. If the United States believes it doesn’t need to respect multilateralism and international rules, how do you get China to respect them,”<sup>81</sup> were comments made by an unnamed senior European diplomat. That is why Europe and the rest of the world are better off continuing along the path of progress without the United States. Apparently, this is their sincere intention echoed in a statement made by Christopher Patten, the EU Commissioner for External Relations: “We are sorry that the U.S. walked away from this international undertaking. The ICC is the most important advance for international law since the establishment of the United Nations. We will not allow [anybody] to water down the commitments contained in the ICC treaty.”<sup>82</sup>

Overall, Europe has a chance to mold the ICC without American interference. The fact is, the United States does not have to sign the treaty to influence the Court. It could support the ICC without signing the Treaty of Rome and still use its soft power to

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<sup>80</sup> Nier Aryeh, “An International Court That America Could Back,” *International Herald Tribune* (30 June 1998), sec. Opinion: 8.

<sup>81</sup> Serge Schmemmann, “U.S. vs. U.N. Court: Two Worldviews,” *The New York Times* (2 July 2002), Sec. A. p.8, col. 3.

<sup>82</sup> “EU/US Rift Widens Over Powers of International Criminal Court,” *European Information Service: European Report* (6 July 2002).

bend members of the ICC to reform the Court in a manner that supports American interests. Another option is: “The United States can watch the Court take shape before deciding to join. If the Court handles its work in a just and fair manner, free from political bias, only then need Washington consider signing up.”<sup>83</sup> By all-out opposition, the United States is missing the chance to at least shape the Court to its liking. Europe is very positive about making the ICC succeed and if it does, then Europe will be leading an institution that has the support of nearly every nation in the world. This is exactly what the EU could use to establish itself as a viable organization serving not only Europe but also the international community.

### **C. AMERICA IN CONFLICT WITH ITSELF**

In a way, the United States’ negative vote for the ICC Treaty and its current stance regarding the Court are strange because they are in conflict with American ideals and its prior conduct. The United States, more than any other nation, brought about the signing of the UN Charter in San Francisco in 1945. After the Second World War, the principal architect for the Nuremberg Trials and the Tokyo Tribunals was also the United States. More recently, it was the United States that insisted on the tribunals that are now adjudicating the war crimes in Bosnia and Rwanda. The United States, has in fact, pushed for international institutions and organizations as an effective and low-cost way to serve its national interest for issues such as controlling weapons proliferation, terrorism, and regulating the global markets. Some of the international treaties that have been created over time have been signed by the United States and some have not. For the most part, however, the United States supports international treaties and their provisions even if it is not a signatory. A country can support and abide by a treaty without actually signing it, such as in the previously mentioned case of the UN Convention on Law of the Sea. That the United States has signed or “unsigned” the ICC is not as significant as the fact that the United States is in all-out opposition to the Court but there is some symbolism with a signature, especially in the case of the ICC. President Clinton decided that the only way to stay engaged in the process of advancing U.S. goals of creating an

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<sup>83</sup> Ruth Wedgwood, “Fiddling in Rome,” *Foreign Affairs* (November/December 1998): 24.

impartial, effective and properly constituted ICC was to sign the treaty. By not seeking or recommending ratification until the “technical glitches” and “serious flaws” in the treaty were addressed, he sustained his commitment to protecting Americans from unwarranted prosecutions. By “unsigned” the treaty, President Bush made it absolutely clear that he had closed the door on the possibility that the United States would ever support the ICC. The actions of the two Presidents show an America conflicted by its sense of moral standing and its natural inclination to protect itself.

#### **D. DISAGREEMENTS THREATEN NOT ONLY THE ICC BUT ALSO THE TRANS-ATLANTIC PARTNERSHIP**

The United States has managed to win agreements from twenty-four countries to never surrender to the ICC any Americans who happen to be within their borders, offering the same in return, and is pushing many other countries to sign similar deals. American hopes that a web of such agreements, which it claims are sanctioned under an obscure provision of the Court’s treaty in Article 98, will in effect give it the global immunity from the ICC’s jurisdiction to which it insists it is entitled.<sup>84</sup> The EU tried to impose a ban on any such deals between America and its member-states, as well as central European countries attempting to join the organization. The United States in turn made reciprocal suggestions to countries wanting to join NATO and, ironically, some of these countries are trying to join both NATO and the EU. With the United States threatening to either veto UN peacekeeping operations or at least withdraw American forces, the Europeans have toned down their opposition. In July 2002 the residing president of the EU announced before UN Security Council that, “The EU welcomes the compromise reached in the UN... [and] particularly pleased that the mandate of the UN

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<sup>84</sup> Bell & Howell Information and Learning, “Bringing Tyrants to Book,” *Economist.com: Global Agenda* (March 2003). [Article 98 of the Rome Statute - Cooperation with respect to waiver of immunity and consent to surrender: 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.]

Mission to Bosnia-Herzegovina (UNMIBH) is extended until the end of the year.”<sup>85</sup> The extension of the mandate will ensure an orderly transition between the UN Mission and EU Police Mission. Some Europeans have looked on this agreement as a necessary point of balance to support a continued international presence in the region that is crucial to peace and stability. Others believe that the agreement is an attack on the credibility of the UN and on the progress that the ICC has thus far achieved.

The United States may, as well, be setting a bad example for other countries that also seek immunity and want to undermine the Court. It is likely that brutal dictators that want to shield themselves and their actions against foreign intervention rule those countries and this may not be in the American interest. Particularly in the case of the peacekeepers in Bosnia, the American threats to withdraw its forces from the region is bad for stability and damages U.S. credibility in the region.<sup>86</sup>

For the Europeans, the American stance amounts to a double standard: one set of rules for the United States, another for the rest of the world. Several stands taken by the United States since the end of the Cold War – against the Kyoto Protocols on greenhouse gases, against biological weapons testing, against a ban on land mines – have especially irritated the Europeans.<sup>87</sup> Other Europeans feel that the ICC issue is not as huge an issue as it appears. When asked about this, a Foreign Office official said that although there were clearly “some people out there who wanted the ICC question to be as big a spat with America as possible, there really has not been a great surge of anger in the U.K. about it.”<sup>88</sup> But the United Kingdom, America’s closest ally, may not represent the central European view. And the British themselves have said that the United States is wrong in its assumptions about the Court. The United Kingdom’s Foreign Secretary, Robin Cook has said, “While we understand the concerns of [the US] Congress we think it’s a mistake to think American servicemen would come before the ICC so long as that a U.S. remedy

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<sup>85</sup> “EU Pleased with Agreement on Immunity of UN Personnel,” *Agence Europe* (15 June 2002).

<sup>86</sup> Congressional Information Services, “Not Keeping Up Appearances,” *Transitions* (2-8 July 2002).

<sup>87</sup> Serge Schmemmann, “U.S. vs. U.N. Court: Two Worldviews,” *The New York Times* (2 July 2002), Sec A. p.8, col. 3.

<sup>88</sup> John Vinocur, “In Private, U.S. and Europe Aren’t Battling,” *The International Herald Tribune* (17 July 2002), p. 1.

is available for such a crime.”<sup>89</sup> The ICC issue is a big deal because if the Court fails, the Europeans may blame the United States and many have said that the Court will mainly fail because it needs the United States for funding and to give the Court backing power. If the Court succeeds, the Europeans will remain upset that the United States refuses to acknowledge the ICC as a legitimate international institution. Either way, the United States loses and America and Europe are put on opposing sides. “Unless we get our way, even in minor episodes, we’ll shut down the system of international cooperation. That dictatorial language is both insufferable and unnecessary, and our allies have every right to protest it.”<sup>90</sup> Because America is powerful and has many ways of imposing its will, it may be that the United States does not need the ICC (at least in terms of prosecuting American criminals) but the rest of the world does and the United States should be sensitive to that. It is not big deal that the United States loses out on becoming part of the ICC but it is a huge deal that the United States may be losing its friends in the process.

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<sup>89</sup> Andrew Parker, “US ‘Wrong’ on War Crimes Worries: International Criminal Court Foreign Secretary Says Soldiers not at Risk from Politically Motivated Prosecution,” *Financial Times*, London (26 August 2000), Late Ed., p. 4.

<sup>90</sup> David C. Hendrickson, “Toward Universal Empire,” 6.

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#### **IV. CONCLUSIONS AND RECOMMENDATIONS: WHERE NOW WITH INTERNATIONAL CRIMINAL JUSTICE AND THE EURO- AMERICAN PARTNERSHIP**

Civil and natural law are not different kinds, but different parts of law, whereof one part, being written, is called civil, the other, unwritten, natural. But the right of nature, that is, the natural liberty of man, may by the civil law be abridged and restrained: nay, the end of making laws is no other but such restraint, without which there cannot possibly be and peace. And law was brought into the world for nothing else but to limit that natural liberty of particular men in such manner, as they might not hurt, but assist one another and join together against a common enemy.

- Hobbes, *Leviathan* (1588-1679), Civil Law and Natural Law

For the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a power to execute that law, and thereby preserve the innocent and restrain offenders. And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in the state of perfect equality where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do so.

- Locke, *Two Treatises of Government* (1632-1704), The State of Nature

The greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a civil society which can administer justice universally.

- Kant, *Idea for a Universal History and Perpetual Peace* (1724-1804), Idea for a Universal History with a Cosmopolitan Purpose, Fifth Proposition

Many of the pros and cons concerning the ICC have been reviewed and it has been suggested that it is an unfortunate circumstance that Europe and the United States now oppose each other on this issue. In many ways, Europeans and Americans want the same thing – they want an effective international method to properly judge and punish the world's worst criminals. But the trans-Atlantic partners cannot agree on how to attain this goal. The two sides are talking past one another and are unable to compromise. As long as the United States has anything to do with it, the ICC will not be an effective



institution and it is probably too late for America to change its mind on the issue. So what is left as an option for a middle ground solution? This chapter will attempt to make some conclusions and recommendations to that end.

#### **A. SOME IDEAS ON A POSSIBLE COMPROMISE**

First, ad hoc tribunals could remain as the status quo, similar to those established for the former Yugoslavia (ICTY) and Rwanda (ICTR). Second, mixed courts, also what are being called “hybrid” or “special” courts, which share some similarities with ad hoc tribunals could be created as has been done in Sierra Leone. Third, the international community could leave international criminal justice to national courts, assisting those governments that are too weak, too poor or in danger of collapsing and thus unable to conduct effective trials on their own. This third option has been exercised in places such as the Congo and East Timor.<sup>91</sup> The first and third options are reasonably clear in what they entail but the second option, special courts, needs a little explaining. Special courts are created and run by the United Nations but unlike the ad hoc tribunals, which only have jurisdiction over international offenses, these types of courts have concurrent jurisdiction over international offenses and national offenses of the home country sponsoring the court. To speed up the set-up process, the Sierra Leone Special Court has adopted rules of ICTR and other existing international criminal institutions. The advantage is that the special courts do not have to “re-invent the wheel” and the country where offenses were committed has a big influence in how the court is operated while still receiving assistance from the UN.<sup>92</sup>

The Europeans, along with many other supporters, have pledged to continue implementing the ICC but at the same time have not suggested that ICC take over existing ad hoc tribunals, special courts, or other arrangements currently in progress. The long-term goal of the ICC is to replace these other forms of international criminal institutions but it is unlikely that this goal will be achieved any time soon. To do so would require the ICC to fulfill the roles of ad hoc tribunals, special courts, and other

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<sup>91</sup> The three ideas taken from: Daryl A. Mundis, “New Mechanisms for the Enforcement of International Humanitarian Law,” *American Journal of International Law*, vol. 95, is. 4 (October 2001): 934-952.

<sup>92</sup> *Ibid.*, 935-936.

forms all in one institution, which would require a great deal of reform to the present structure of the ICC. Some possibilities (listed below) could make the ICC a more desirable choice of compromise between the Europe and the United States.

First, the ICC may consider only headquartering itself in the Hague but setting up court for specific cases in the aggrieved country or region, when possible, in order to give people a sense that justice is being served where it should; in their own backyard where atrocities occurred and not in some distant place where there is no sense of ownership of the process. At the headquarters, there could be a pool of judges that could be drawn from for this purpose, along with all necessary staff and apparatus. If there were enough judges, they could specialize in certain areas of international law such as military operations, business, diplomacy, and universal human rights. “The United States should take steps to make sure that the members of the International Criminal Court are educated in the nature and demands of modern military operations.”<sup>93</sup> The benefit is that there would be a permanent international criminal justice structure that could be molded for specific events. When judges and their staffs are not handling a case, then they are closely monitoring world events, studying the law, maintaining dialogue with the members of the court, and perhaps conducting mock trials to keep their skills honed. On the other hand, there may be enough cases brought before the court to keep the whole organization well occupied.

Second, the ICC would partner itself with the countries concerned, similar to the special courts, and set up a court that is run by both representatives of the UN and representatives of the countries concerned. Like special courts, concurrent jurisdiction of international and national law would be created. If desired, the countries concerned could include judges and staff of their own (obviously some stringent guidelines would be needed) as another way to give those countries ownership of the process. The problem ad hoc tribunals are currently facing, and a problem that the ICC will similarly face, is the non-cooperation of the countries where atrocities occurred. For example, as with the two

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<sup>93</sup> In a statement made by Ruth Wedgwood, Professor of Law, Yale University and Senior Fellow and Director of the Project for International Organizations and Law, Council on Foreign Relations. Congress, Senate, Committee on Foreign Relations, *Is a U.N. International Criminal Court in the U.S. National Interest?*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 23 July 1998, 26.

ad hoc tribunals (ICTY and ICTR), the lack of state cooperation, including inadequate access to evidence and crimes sites, and the unwillingness of many states to arrest indicted individuals, are hindering progress.<sup>94</sup>

Finally, the ICC will have to be powerful enough to enforce its jurisdiction and back up its decisions. If an institution such as the ICC is to ever truly have a deterrent capability, then those who commit atrocities will have to clearly see that those institutions are capable of imposing their will through force if necessary. What this likely means is that the ICC cannot remain a separate entity from the UN but will have to at least form a strong partnership. Of course, this brings back the argument that the Security Council veto power will compromise the Court by introducing political considerations. On the other hand, is there such a thing as an apolitical international organization? Is it not more desirable that the politics of such a court reside at a premier and all-encompassing institution such as the UN rather than at a new, untested, and independent ICC? Justice will always have to be enforced and assured through force in one form or another, otherwise judgments would be nothing more than abstract pronouncements.

The ICC and international justice in general are issues of great concern and it will likely continue to remain one of the top issues of international affairs far into this new millennium. Together, Europe and the United States could create a powerful system that has long been sought for addressing international crimes. Apart, the two partners will work against each other and detract from progress that has thus far been made. That is why great care must be taken when proceeding and compromising on the solution for international criminal justice.

## **B. WHAT IS REALLY HAPPENING NOW: THE IRAQ TEST-BED**

The United States has promised to bring the Saddam Hussein regime to justice, but how will it go about doing this? Obviously the ICC is out of the question. Since the United States has chosen to act unilaterally in Iraq and ignoring objections from other Security Council members (especially France and Russia), having the UN sponsor an ad

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<sup>94</sup> Daryl A. Mundis, "New Mechanisms for the Enforcement of International Humanitarian Law," *American Journal of International Law*, vol. 95, is. 4 (October 2001): 952.

hoc tribunal seems a doubtful American proposed idea. The ICC would have no jurisdiction over most of Saddam's crimes in any case, since they occurred before the Treaty of Rome entered into force. As mentioned in Chapter I, the ICC statutes state that only crimes committed after July 1, 2000 are eligible for trial. So if the court tried Hussein, then the ICC would be guilty, as Nuremberg was, of applying a body of law which had not up to that point been clear or fully applicable. As such, a case brought before the ICC could not address Saddam's long track record of crimes against Iraqi's, which makes it a very poor venue for this purpose. On the other hand, ad hoc tribunals are a possibility, however, because China, one of the five permanent Security Council members, also voted against the Rome Statute. Thus, if the UN decided to defer the case to the ICC, China and the United States would most likely object and could suggest a tribunal as the next best alternative. This does not seem to be the case, however, as it appears that the United States will again act unilaterally in administering justice in Iraq. On February 28, 2003, with no fanfare and no media attention, the Department of Defense posted a 6000-word document on its website entitled: Military Commission Instruction, which apparently includes military tribunals in the post-war plans.<sup>95</sup> With military tribunals, there is no full guarantee of due process, secret hearings are permitted, death sentences can be imposed much more easily than in civil cases, and there are no appeals to civil courts.

While the United States' likely choice of military tribunals has enraged many supporters of the ICC, the ICC itself has been used by flamboyant journalist, and the like, to threaten its supporters and is showing some potential to backfire on countries that have signed the treaty. The London Times published an article on March 18, 2003 that stated, "Should the United Kingdom attack Iraq without consent of the United Nations Security Council, and civilians are compromised in any way, Tony Blair will be liable for prosecution by the International Criminal Court for war crimes which are a violation of the Geneva Conventions of August 12, 1949."<sup>96</sup> This does seem ridiculous when the

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<sup>95</sup> George Fletcher, "War Crimes Proceedings in Iraq?: The Bush Administration's Dilemma," sponsored by Find Law Corporate Counsel Center (4 April 2003).

<sup>96</sup> Gordon McKellar, "Legality or Culpability of Military Action Against Saddam," *The Times*, London (13 March 2003).

quoted article makes a case against Tony Blair being tried at the ICC and says nothing about Saddam Hussein or any other tyrant who has been known to bring suffering to people. Tony Blair is not even close to being in the same league that Saddam Hussein is in with respects to being suspect of international crimes. Without knowing it, the journalist who wrote the quoted article is potentially doing serious damage to the ICC, especially when used to accuse one of its greatest supporters, Tony Blair, who represents the United Kingdom. This is a preposterous use of the ICC to support anti-war propaganda and even more practically, the purpose of the ICC is not aimed in preventing state action (that is the job of the UN and other international bodies and agreements) but rather is designed to discourage individuals from committing international crimes and properly punishing them if they do so. If the supporters are going down the route of using the ICC as tool to promote their own agendas, then the United States' concerns about the court – politically motivated charges, unaccountability, and unlawful jurisdiction - have been validated and it should be disbanded immediately. Another London Times article summarizing the personal views of Senator Jesse Helms also quoted a Dutch diplomat who said about the Court, "I won't say we gave birth to a monster, but the baby has some defects."<sup>97</sup> In the same article Helms says that the court is a monster and that it needed slaying. The United States is falling unfavorably with the rest of world for not supporting the Court but now that some journalists, scholars and activists have found ways to taunt political figures (such as President Bush or Prime Minister Blair) with the ICC, there may be an overall better understanding of the American stance toward the court.

### **C. A FINAL OUTLOOK**

At the heart of the United States' disapproval of the ICC is the question of sovereignty. All other arguments about exposing soldiers and officials to unlawful jurisdiction lead to the issue of sovereignty. Logically, why should the most powerful nation on the earth surrender its power and sovereignty if it does not have to? The United States has demanded that the UN Security Council be in charge of tribunals concerning

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<sup>97</sup> Jesse Helms, ed. Personal view, "Slay This Monster," *The Times*, London (30 July 1998).

grave breaches of international law, not an independent court. According to John Bolton, the Under-Secretary of State for Arms Control and International Security, “the ICC will be overbearing and unaccountable... Why should anyone imagine that bewigged judges in the Hague will succeed where cold steel has failed?”<sup>98</sup> The real issue is that the United States does not want to subject itself to the court because it fears the great power it holds will be reduced in some way and that its sovereign rights as a state to act independently may be somewhat limited. This assessment may be correct:

For, if the rights of each man can be asserted on the world political stage over and against the claims of his state, and his duties proclaimed irrespective of his position as a servant or a citizen of that state, then the position of the state as a body sovereign over its citizens, and entitled to command their obedience, has been subject to challenge, and the structure of the society of sovereign states has been placed in jeopardy. <sup>99</sup>

This assessment should be nothing the United States should fear, however. Rather it should be something for the United States to embrace because this has been the central basis on which the world has prosecuted its worst criminals in the past. There is no reason why the next step should not be taken to prevent state sovereignty from obstructing world justice: “Nuremberg deprived individuals of the right to excuse terror by hiding behind sovereign immunity. The time may come when states can be held to the same standard.”<sup>100</sup>

Regardless of what the United States does in the future with respect to the ICC, the current American position has contributed to the deterioration of trans-Atlantic relations and may harm U.S. efforts to prosecute future war criminals and potentially in the continuing war on terrorism. American success will depend on aid from its friends and allies and so far America is off to a shaky start. On the other hand, it is a good possibility, with genuine concern and diplomatic skill, that the United States and Europe will be able to reach a commonly valued outcome for international criminal justice, whether that be in the form of the ICC or not.

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<sup>98</sup> John R. Bolton, “Courting Danger.” *The National Interest* (Winter 1998/99): 66.

<sup>99</sup> Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 1977): p. 146.

<sup>100</sup> Daniel Moran, “Restraints on Violence and the Reconstruction of International Order After 1945,” Paper presented at the symposium on War and Terror, sponsored by the Association for Contemporary German Studies, Washington D.C. (October, 2002): 9.

The implications for situations much further in the future may be more profoundly affected by how the United States and Europe proceed from this point forward in the quest to rid the world of future Hitlers, Pol Pots, Pinochets, Milosevics, and Husseins and bring such men to justice. The spirit of the ICC and the logic that it has been founded on are strong but it is not clear that it will be effective or even survive without the full backing of the world's most powerful country - the United States. It is unfortunate that cooperation has thus far failed to establish a common solution for ensuring that acts such as the Holocaust and episodes of genocide are not repeated and that the lessons learned from Nuremberg to the Hague are not taken in vain. Unfortunately, it will likely take more atrocities before world justice is properly served.

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